

ESTTA Tracking number: **ESTTA499805**Filing date: **10/12/2012**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Cockpit USA, Inc.		
Entity	Corporation	Citizenship	New York
Address	15 West 39th Street New York, NY 10018 UNITED STATES		
Attorney information	E. Cooke Rand, Esq. Rand Rosenzweig Radley & Gordon LLP 800 Third Ave. Suite 2604 New York, NY 10022 UNITED STATES erand@randrose.com, ccampbell@randrose.com Phone: 212-687-7000		

Registration Subject to Cancellation

Registration No	2817325	Registration date	02/24/2004
Registrant	TOP GUN INTELLECTUAL PROPERTIES, LLC 31-65 STEINWAY ASTORIA, NY 11103 UNITED STATES		

Goods/Services Subject to Cancellation

Class 025. First Use: 1996/07/06 First Use In Commerce: 1996/07/06
All goods and services in the class are cancelled, namely: Footwear, shoes, sandals; Clothing, namely, leather jackets, sport coats, jeans, sweatshirts, T-shirts, caps, hats, belts, and excluding protective clothing and working gloves

Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l. Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Genericness	Trademark Act section 23

Attachments	Cancellation Petition.pdf (9 pages)(208442 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/ECR/
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Name	E. Cooke Rand, Esq.
Date	10/12/2012

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration No. 2,817,325
Date of Issue: February 24, 2004
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Cockpit USA, Inc.

Petitioner,

v.

Cancellation No.:

Top Gun Intellectual Properties
LLC,

Registrant.
.....

To: Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

PETITION FOR CANCELLATION

Petitioner Cockpit USA, Inc. ("Petitioner"), by its attorneys, Rand Rosenzweig Radley & Gordon LLP, alleges that it is damaged by Registration No. 2,817,325 ("Reg. '325"), and hereby petitions to cancel the same. The grounds for cancellation are as follows:

1. Petitioner is a New York corporation, having a place of business at 15 West 39th Street, New York, New York, 10018. Petitioner was incorporated as Avirex Ltd; in 2006 Petitioner's corporate name was changed to Cockpit USA, Inc.

2. Upon information and belief, the current owner of Reg. '325 is Top Gun Intellectual Properties LLC ("Registrant"), a New York limited liability company with a business address of 31-65 Steinway, Astoria, N.Y. 11103. The original registrant of Reg. '325 was Ayal Hod ("Hod"). Hod assigned Reg. '325 to Registrant on July 16, 2007. Hod executed the Combined Declaration of Use and Incontestability under Sections 8 & 15 filed on September 10, 2009 with respect to Reg. '325 as Principal of Registrant.

3. On February 25, 2003, by application assigned serial number 78,218,644 (the "Application"), Hod applied to register the mark TOP GUN in International Class 25 ("IC 25") alleging a date of first use of July 6, 1996 and a date of first use in commerce of July 6, 1996 (the "Claimed First Use Date"). Reg. '325 issued on February 24, 2004 registering the mark TOP GUN in IC 25 for the following listed goods: "Footwear, shoes, sandals; Clothing, namely, leather jackets, sports coats, jeans, sweatshirts, T-shirts, caps, hats, belts, and excluding protective clothing and work gloves" (the "Listed Goods").

Petitioner's Prior Use of the Mark TOP GUN on or in Connection with Certain Goods in IC 25

4. Petitioner is a designer, developer, producer and marketer of men's, women's, and children's apparel and other products. Petitioner's products are sold and distributed throughout the United States, directly to consumers through its catalogs, website and retail store, and indirectly by sales, at wholesale, to brick-and-mortar stores and catalog and online retailers.

5. In business since 1977, Petitioner has long been known to consumers and to retailers as a source, among other things, for military styled flight jackets, including the “G-1” jacket, a leather jacket with a fur collar issued to naval aviation officers and enlisted personnel on flying status. Issued without patches adorning the exterior, it is and has been the practice of aviators, particularly naval aviators, to decorate the exterior of their G-1 jackets with patches. Petitioner developed, promoted, marketed and sold G-1 jackets commercially with and without patches.

6. “Top Gun” is the colloquial term for the United States Navy Strike Fighter Tactics Instructor program which teaches advanced fighter weapons flight tactics to select Navy pilots. The term was popularized through the Paramount Pictures’ movie entitled “Top Gun,” starring Tom Cruise. In the movie, released in the U.S. in May of 1986, actors, including Mr. Cruise, wore G-1 jackets with patches similar to the G-1 jackets worn by pilots in the Navy’s Top Gun program and similar to the G-1 jackets which had been and then were being marketed and sold by Petitioner.

7. In connection with the “Top Gun” movie, Petitioner and Paramount Pictures entered into a license agreement for the use of the mark TOP GUN. Pursuant to the license agreement, Petitioner used the mark TOP GUN on and in connection with certain items of apparel.

8. After the license agreement ended, Petitioner continued, and continues, using the mark TOP GUN to identify certain of its apparel products, including its G-1 leather jacket with patches (the “Top Gun Jacket”), in connection with the marketing and sale of such products at wholesale and retail. Such use of the mark TOP GUN by Petitioner preceded the Claimed First Use Date of Reg. ‘325.

Business Relationship Between Petitioner and Hod

9. Upon information and belief, Hod caused the incorporation in the State of New York of T.G. Request, Inc. (“T.G. Request”) on June 17, 1996, and at all times relevant herein, Hod owned all of the shares of stock in T.G. Request or otherwise controlled T.G. Request.

10. Upon information and belief, T.G. Request was organized by Hod to operate a multi-brand retail store on Steinway Street in Astoria, New York under the name “Top Gun” (the “Store”). Later, other retail stores were opened by T.G. Request under the name “Top Gun.”

11. Upon information and belief, the first use of the mark TOP GUN in commerce on IC 25 goods by Hod, as claimed by Hod in the Application, occurred through T.G. Request. Before the use by Hod or by T.G. Request of the mark TOP GUN on goods in IC 25, Hod knew that Petitioner was using the mark TOP GUN in commerce in connection with certain of its IC 25 goods, including its Top Gun Jacket.

12. During the period July 1996 to March 2003, T.G. Request purchased apparel products from Petitioner for resale. Among the apparel products purchased by T.G. Request from Petitioner were Top Gun Jackets. The first purchases of Top Gun Jackets by T.G. Request from Petitioner occurred in July 1996 and thereafter continued to occur throughout 1997, 1998, 1999, 2000, 2001 and 2002, with the final such purchase occurring in March 2003.

13. Before the filing of the Application, Hod knew that Petitioner had been using the mark TOP GUN in commerce in connection with IC 25 goods and that Petitioner's use preceded Hod's or T.G. Request's first use of the mark TOP GUN on or in connection with IC 25 goods. b6
b7C

Registrant's Threats of Legal Action against Customers of Petitioner

14. U.S. Wings, Inc. and My Plane, Inc. are online retailers of aviation related products. U.S. Wings, Inc. operates the website uswings.com. My Plane, Inc. operates the website mypilotstore.com. Each is a customer of Petitioner and each advertises and sells the Petitioner's Top Gun Jacket on its website.

15. Registrant, through its attorneys, sent a letter to U.S. Wings, Inc. stating that U.S. Wings, Inc. by featuring Petitioner's Top Gun Jacket on its site was infringing on Registrant's rights to Reg. '325, and, among other things, demanding that U.S. Wings, Inc. cease and desist using the term Top Gun in connection with leather jackets and threatening to take legal action against it if it fails to do so.

16. Registrant, through its attorneys, sent a letter to My Plane, Inc. stating that My Plane, Inc. by featuring Petitioner's Top Gun Jacket on its site was infringing on Registrant's rights to Reg. '325, and, among other things, demanding that My Plane, Inc. cease and desist using the term Top Gun in connection with leather jackets and threatening to take legal action against it if it fails to do so.

17. Upon information and belief, Registrant has already or intends to threaten other of Petitioner's customers.

18. Petitioner will suffer damage if as a result of Registrant's threats any of its customers cease purchasing its products.

Registrant's Fraud on the USPTO in Procurement of Registration No. 2,817,325

19. In the Application, Hod declared that he knows of no other person, firm, corporation, or association that has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods listed of such other person, to cause confusion, or to cause mistake, or to deceive. Hod's declaration was false in that prior to filing the Application, Hod knew that prior to the Claimed First Use Date Petitioner had been using the mark in commerce, and had the right to use the mark in commerce, in connection with goods listed in the Application.

20. Hod made the false declaration of a material fact in the Application with the intent to deceive the USPTO to obtain registration of the mark TOP GUN in IC 25.

21. Reg. '325 was fraudulently obtained by the Registrant's Principal and predecessor, Hod. As such, Reg. '325 is invalid and must be cancelled.

Registrant's Fraud on the USPTO in the Combined Declaration of Use and Incontestability under Sections 8 & 15 for Registration No. 2,817,325 (the "Combined Declaration")

Section 8 Declaration of Use

22. On September 10, 2009, Registrant filed a Declaration of Use as part of the Combined Declaration.

23. In the Combined Declaration, Hod, as Principal of Registrant, made a false representation of a material fact in the Declaration of Use. At the time he made such declaration he knew it was not true, and as such Registrant has committed fraud on the USPTO that requires cancellation of Reg. '325.

24. In the Declaration of Use portion of the Combined Declaration, Hod declared that "For International Class 025, the mark is in use in commerce on or in connection with **all** of the goods or services listed in the existing registration for this specific class; . . ." (emphasis in original), which declaration was false.

25. Upon information and belief, on September 10, 2009, all of the Listed Goods were not in use in commerce.

26. Registrant submitted the said false declaration with the intent to deceive the USPTO to continue registration of the mark TOP GUN in IC 25 for each of the Listed Goods.

27. By reason of the foregoing, Reg. '325 was fraudulently continued by the Registrant for all the Listed Goods. As such, Reg. '325 is invalid and must be cancelled.

Section 15 Declaration of Incontestability

28. On September 10, 2009, Registrant filed a Declaration of Incontestability as part of the Combined Declaration.

29. In the Combined Declaration, Hod, as Principal of Registrant, made a false representation of a material fact in the Declaration of Incontestability. At the time he made such declaration he knew it was not true, and as such Registrant has committed fraud on the USPTO that requires cancellation of Reg. '325.

30. In the Declaration of Incontestability portion of the Combined Declaration, Hod declared that "the mark has been continuously used in commerce for five (5) consecutive years after the date of registration, . . . and is still in use in commerce on or in connection with **all** goods or services listed in the existing registration for this class" (emphasis in original), which declaration was false.

31. Upon information and belief, on September 10, 2009, the mark had not been continuously used in commerce for five (5) consecutive years after the date of registration on or in connection with all the Listed Goods.

32. Registrant submitted the said false declaration with the intent to deceive the USPTO to obtain incontestability status of Registrant's registration of the mark TOP GUN in IC 25 for each of the Listed Goods.

33. By reason of the foregoing, incontestability status for all the Listed Goods was fraudulently obtained by Registrant. As such, Reg. '325 is invalid and must be cancelled.

In the Alternative - Reg. '325 Should Be Cancelled as Generic in IC 25 as to Leather Jackets

34. As a result of Paramount Picture's Top Gun movie and the commercial efforts of Petitioner and others, the term "Top Gun" has become synonymous with flight jackets. As such, the use of the identifier Top Gun with such jackets has become generic.

35. With the mark TOP GUN now generic for flight jackets in International Class 25, Reg '325 should be cancelled insofar as it includes "leather jackets."

WHEREFORE, the Petitioner, through its attorneys, Rand Rosenzweig Radley & Gordon LLP, requests that Registration No. 2,817,325 be cancelled. Alternatively, if Registration No. 2,817,325 is not cancelled in its entirety, registration as to "leather jackets" should be cancelled as generic.

Respectfully submitted,

/s/

E. Cooke Rand

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